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No. _____

In The

Supreme Court of the United States

October Term, 1996

F/T ROYAL KING, #592205 ROYAL KING FISHERIES, Inc. and ROYAL SEAFOODS, Inc.,

Petitioners,

v.

VILMOS FUSZEK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 45 U.S.C. § 53 precludes the assessment of comparative fault in a Jones Act seaman's claim whenever the violation of an administrative safety regulation is found on a vessel?

PARTIES

The parties to this action and their counsel of record are as follows:

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CORPORATE DISCLOSURE

Petitioners ROYAL KING FISHERIES, INC. (now known as "REBECCA ANN Fisheries, Inc.), and ROYAL SEAFOODS, INC., have as their parent company RGI (BV), a Netherlands Antilles company, and have no subsidiaries.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, filed October 23, 1996 (App. 1-14), is reported at 98 F.3d 514 (9th Cir. 1995). The District Court rendered findings of fact and conclusions of law (App. 18-27) and entered judgment on January 24, 1995 (App. 15). The District Court rendered a supplemental decision (App. 28-34) and entered an amended judgment on March 20, 1995 (App. 16). The District Court entered its second amended judgment on January 13, 1997 (App. 17). The District Court's findings of fact and conclusions of law, supplemental decision, judgment, amended judgment and second amended judgment are not published.

JURISDICTION

The Ninth Circuit Court of Appeals filed its opinion on October 23, 1996 (App. 2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Because plaintiff/respondent, Vilmos Fuszek's claim is for personal injuries to a seaman as defined under the Jones Act, 46 U.S.C. §688, *et seq.*, Fuszek's claims fall within the jurisdiction of the federal courts under 28 U.S.C. §1331 and §1333.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

46 U.S.C. §688 Recovery for injury to or death of seaman

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at

law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .

45 U.S.C. §53 Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908 c. 1949, §3, 35 Stat. 66.)

46 C.F.R. §28.215(b) Guards for exposed hazards

(b) Suitable hand covers, guards, or railing must be installed in way of machinery which can cause injury to personnel, such as gearing, chain or belt drives, and rotating shafting. This is not meant to restrict necessary access to fishing equipment such as winches, drums, or gurdies.

STATEMENT OF THE CASE

A. The Nature of the Controversy

This is a maritime case involving a well skilled and highly trained technician, experienced in working on Baader fish processing machines (App. 19-22, 24). Fuszek worked as a Baader technician aboard the F/T ROYAL KING, a vessel owned and operated by petitioners/ defendants Royal Seafoods, Inc. and Royal King Fisheries, Inc. ("Royal"). As technician, Fuszek was responsible for maintaining, repairing and operating the Baader 99 processing machine. Fuszek was intimately familiar with the machine's problems and the dangers associated with its operation. (App. 21-22).

Fuszek was injured on or about February 28, 1993, when his hand became caught in the Baader 99. (App. 20, 23). Fuszek brought this action against Royal under the Jones Act and general maritime law (App. 7). The District Court for the Western District of Washington had jurisdiction under 46 U.S.C. §688, 28 U.S.C. §1331 and §1333.

B. Proceedings Below

1. The District Court's Decision

The case was tried before the Honorable William Dwyer on January 17-24, 1995. At the conclusion of trial, the District Court found that Royal was liable based on Jones Act negligence and unseaworthiness under the general maritime law, and that Fuszek was comparatively negligent to the extent of twenty-five percent (25%) in causing his injuries. The District Court also found a violation of a Coast Guard regulation, 46 C.F.R. §28.215 (requiring "suitable hand covers, guards, or railing [to]

be installed in machinery which can cause injury to personnel . . . "). The District Court held that the comparative negligence of the plaintiff reduced his award, notwithstanding the violation of the Coast Guard regulation.

The District Court entered judgment on January 24, 1995 (App. 15). The parties cross-moved for new trial and amendment of findings of fact under Fed. R. Civ. P. 59(a) and 52(b) (App. 29-31). On March 16, 1995, when oral argument was held on those motions, the District Court rendered its supplemental decision (App. 28-34). In that supplemental decision the District Court revisited its ruling on the issue of comparative fault. The District Court reiterated its determination that, in maritime law, the long-standing doctrine of comparative fault was available, even where a Coast Guard regulation had been violated (App. 32-33). The District Court entered an amended judgment on March 20, 1995 (App. 16), and Fuszek appealed. The Ninth Circuit had subject matter jurisdiction under 28 U.S.C. §1291.

2. The Ninth Circuit's Opinion

In its opinion, filed October 23, 1996, the Ninth Circuit reversed the District Court's decision to reduce Fuszek's damage award by twenty-five percent for comparative negligence. The Circuit Court held that the finding of a Coast Guard violation should have invoked the provisions in 45 U.S.C. §53, and interpreted that statute to deny the vessel owner the defense of comparative negligence.

REASONS FOR GRANTING THE WRIT

A. This Is An Important Question; The Court's Direction is Needed

In defining and refining seamen's personal injury actions over the last century, this Court has consistently held that comparative negligence applied to reduce a seaman's recovery under either the Jones Act, 46 U.S.C. §688 *et seq.*, or the general maritime law. *See, United States v. Reliable Transfer Co.*, 421 U.S. 406, 98 L.Ed.2d 143, 74 S.Ct. 1708 (1975). Misapplying a provision from the Federal Employers Liability Act ("FELA"), the Ninth Circuit decision at issue here would do away with that well-established rule of law whenever a regulatory violation is found to be a cause of the injury or death. The Ninth Circuit's ruling is inconsistent with Congress' intent when it enacted the Jones Act. Moreover, at a time when regulations applicable to vessels are proliferating, the effect of this erroneous course would be to largely abolish comparative negligence as a cornerstone of the maritime law applicable to seamen. Such a fundamental shift away from the policy of making the parties responsible for their own fault in causing accidents would be a huge and unwise change within the maritime law.

This Court's prior decisions leave no doubt but that comparative fault should be applied against any party who has engaged in culpable conduct leading to his own injury. However, this Court has not rendered a decision on the precise issue presented here, i.e., the application of 45 U.S.C. §53 in a maritime case, and the statute's proper construction in that context. To the extent there is any question that the statute might be interpreted to eliminate

entrenched concepts of comparative fault, the issue must be considered unsettled and it is important that this Court provide direction on this fundamental issue.

B. The Ninth Circuit's Decision Conflicts This Court's Prior Decisions, With Congress' Intent and With Sound Policy

The Ninth Circuit's ruling, that a seaman may avoid the consequences of his own culpable conduct, is an assault on this Court's commandment that comparative fault is the standard in maritime law. In maritime personal injury actions, this Court long ago recognized the appropriateness of assessing liability based on the parties' respective fault. *Pope & Talbot, Inc., v. Hawn*, 346 U.S. 406, 409, 98 L.Ed. 143, 74 S.Ct. 202 (1953), and authorities cited therein. This Court subsequently announced that comparative fault should be the rule for all admiralty cases, including property damage cases. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). The significance of *Reliable Transfer*, that damages must be assessed according to each parties' proportion of fault, was again emphasized in *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 128 L.Ed.2d 148, 114 S.Ct. 1461 (1994). There, this Court held that a nonsettling defendant could not be held liable under the maritime law for more than its proportionate share of fault, irrespective of settlements reached by other defendants. 128 L.Ed.2d at 162. To allow the Ninth Circuit's ruling to stand would erode this Court's clear and consistent directives that comparative fault is the standard rule in maritime law.

In this case, the District Court imposed personal responsibility, consistent with the rules and remedies long existing in seamen's personal injury actions. The District Court found that the machine at issue did not have suitable guards to prevent the insertion of a body part, and this fact allowed for alternative findings of liability based on either unseaworthiness or a Coast Guard violation. (App. 21-22). The unseaworthiness doctrine requires generally that the machinery be reasonably fit for its intended purpose, without specific criteria specifying what is "reasonably fit." Similarly, 46 U.S.C. §28.215 requires generally that guards be "suitable," without further guidance as to what is "suitable" guarding.

The Ninth Circuit decision would provide for the vessel owners' liability to be reduced by comparative negligence where its machinery was not "reasonably fit," but not where its guarding was not "suitable." The disparate treatment accorded the parties based on these two similar types of findings is said to be both justified and required because "suitable" guards are required in an administrative regulation, whereas the "reasonably fit" requirement comes from the maritime law. This distinction is not drawn from case law, from the regulatory scheme violated, or from the enabling statutory framework which authorized the Coast Guard to promulgate the regulation.

The Ninth Circuit's decision is said to follow, instead, from 45 U.S.C. §53, enacted eighty-three years before the regulation here at issue, for the benefit of railroad workers. That statute denied railroads the defense of comparative negligence where a violation of a "statute

enacted for the safety of employees" contributed to the injury. When that statute was enacted in 1908, there were two statutory schemes which set forth objectively verifiable criteria that railroads were required to follow for the safety of their employees: the Safety Appliance Act, 27 Stat. 531, as amended, 45 U.S.C. §§1-16, and the Boiler Act, 36 Stat. 913, as amended, 45 U.S.C. §§22-34. There was no doubt as to the statutory provisions which triggered application of 45 U.S.C. §53, nor the congressionally specified criteria by which the employer could avoid the penalty provided for in 45 U.S.C. §53. The Ninth Circuit decision would take this clear statutory mandate and apply it to punish a vessel owner based on an ambiguous regulation, promulgated eighty-eight years later by a mere administrative agency. That FELA was generally incorporated into the Jones Act, at 46 U.S.C. §688, neither justifies nor explains this unwise result.

It is true that, when Congress "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31, 112 L.Ed.2d 275, 111 S.Ct. 317 (1990). However, a basic corollary to that rule is that the courts should not set aside a basic tenet of the maritime law where Congress has not spoken directly to the question. On this issue, Congress has not spoken so directly as to displace the fundamental structure of seamen's actions as consistently defined by this Court.

It is apparent on the face of the Jones Act that Congress was intent on modifying or extending the common law through incorporation of FELA, but not on displacing

existing rules and remedies governing recovery in seamen's actions at that time. When FELA and the Jones Act were enacted, the common law provided that contributory negligence of the employee barred him from any recovery, and §53 rejected that doctrine in favor of the doctrine of comparative negligence. *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 824 (5th Cir. 1965). In seamen's actions, however, the doctrine of comparative negligence had always been the rule. Section 53 was largely redundant and unnecessary for seamen's cases, when the Jones Act was enacted.

> Before the Jones Act, contributory negligence was ground for mitigation of damages in suits brought by seamen to recover for injuries attributable to defective equipment, *see Wanderer*, 20 Fed. 140; *Olson vs. Flarel*, 34 Fed. 477, overruling *Peterson vs. The Chandos*, 4 Fed. 645; *Frank and Willie*, 45 Fed. 494; *Julia Fowler*, 49 Fed. 277; *John A. Roebling's Sons Co. vs. Ericson*, 261 Fed. 986, 987; *Cricket S. S. Co. vs. Parry*, 263 Fed. 523; *Storgard vs. France & Canada S. S. Corp.*, 263 Fed. 545; *Panama R. Co. vs. Johnson*, 1923 A. M. C. 798, 289 Fed. 964, *aff'd* 264 U.S. 375, 1924 A. M. C. 551.

The ARIZONA v. Anelich, 298 U.S. 110, 56 S.Ct. 707, 1936 A. M. C. 627 (1936).

Given that §53 was only one of several statutes constituting FELA, and that the main provision of §53 was already the law in admiralty but not in common law, it may be asked what Congress' purpose was in incorporating §53 into the Jones Act along with the rest of FELA. A review of the congressional record offers no insight, and one is comforted by the words of Judge John R. Brown in

asking a similar question while attempting to divine the purpose of FELA:

> Many good legalistic arguments can be marshalled for either view, none however demonstrating with any assurance that at this date we can, to paraphrase Judge Friendly, discern what Congress in 1908 thought about a matter on which it never thought. But even though we cannot cast it in terms of congressional purpose as a proposition of original intent, we still have the task of construing the Act and fashioning a rule to be followed.

Page v. St. Louis Southwestern Railway Co., 349 F.2d 820, 823 (5th Cir. 1965).

It was obviously the intent of Congress in enacting the Jones Act to provide seamen with the same fundamental protections that had been provided to railworkers by FELA. However, the courts have recognized that there are necessary limits to the wholesale adoption of FELA into the maritime law. In one of the first cases to consider the Jones Act, this Court noted:

> The Jones Act thus brings into the maritime law new rules of liability. The source from which these rules are drawn defines them but prescribes nothing as to their operation in the field to which they are transferred. 'In that field their strength and operation come altogether from their inclusion in the maritime law' by virtue of the Jones Act. The election for which it provides 'is between the alternative accorded by the maritime law as modified and not between that law and some non-maritime system.' *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 388,

> 389, 44 S.Ct. 391, 394; and *see Chelentis v. Luckenbach S. S. Co.*, 247 U.S. 372, 380, 381, 38 S.Ct. 501; *Pacific S. S. Co. v. Peterson*, 278 U.S. 130, 49 S.Ct. 75, 76.

The ARIZONA v. Anelich, 298 U.S. 110, 119, 56 S.Ct. 707, 1936 A. M. C. 627 (1936).

And in a companion case to *The ARIZONA*, *Cox v. Roth*, 348 U.S. 207, 209, 99 L.Ed. 260, 755 S.Ct. 242 (1954), this Court explained:

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events.

The Court rejected a literal interpretation of FELA to rule that the death of a tortfeasor does not defeat recovery under the Jones Act. *Id.*

Another example of where the admiralty courts have not followed an overly rigid application of FELA in order to preserve the fundamental features of seamen's actions can be found in the well-established primary duty rule. That rule provides that a seaman may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment. *Bernard v. Maersk Lines, Ltd.*, 22 F.3d 903, 905 (9th Cir. 1994); *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989). The same type of defense, however, assumption of the risk, is unavailable under FELA. 45 U.S.C. §54, *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67-68, 87 L.Ed. 610, 63 S.Ct. 444 (1943).

Returning to the issue at hand, it should be clear that the Court is not constrained by the proviso in 45 U.S.C. §53 to hold that a Coast Guard regulation is a "statute" within the meaning of §53, or to apply that section to the seaman's cause of action to eliminate the defense of comparative fault to employers.

In deciding this case, the Court should consider the basic features of the causes of action of employees against railroads and vessel owners, and the policies which they embody. Under both the Jones Act and FELA, the employers are held to a very high standard of care, and are held liable whenever their negligence is only a slight cause of the injury. *E.g., Dempsey v. Mac Towing, Inc.*, 876 F.2d 1538, 1542 (11th Cir. 1989). Furthermore, since the Jones Act was enacted, the courts have greatly expanded the rights of seamen allowing recovery for injuries on the basis of the unseaworthiness doctrine, to where that doctrine has become the principal vehicle for personal injury recoveries. *See* Gilmore and Black, *The Law of Admiralty* (2nd Ed., 1975) at 383. This is a form of liability without fault, imposing a heavy burden on vessel owners to ensure that the vessel and its equipment are fit. Although Congress apparently intended to afford seamen and railworkers similar protections, this onerous burden of liability without fault imposed on vessel owners has not been applied against railroads.

Moreover, this Court has long since provided vessel owners with strong incentives to comply with safety statutes and regulations. In addition to fines and penalties which attach for violations, vessel owners are liable to seamen for injuries caused by a breach of a safety statute or regulation, even if the injury was not of the type

against which the statute or regulation was designed to protect. *Kernan v. American Dredging Co.*, 355 U.S. 426, 2 L.Ed.2d 382, 78 S.Ct. 394 (1958).

The doctrine of comparative negligence recognizes that it is neither fair nor good policy to hold an employer liable for an employee's damages to the extent the employee is at fault in causing that injury. Applicable tort law should motivate all persons in control of safety conditions to comply with safety regulations – particularly skilled seamen such as the respondent in positions of responsibility for the conditions of equipment. To rule as a matter of law that district courts do not have discretion to reduce a plaintiff's award to the extent the plaintiff caused his or her own injury would constitute unsound policy, would be grossly unfair, and would discourage rather than encourage worker safety.

CONCLUSION

By reversing the District Court on the applicability of comparative negligence in seamen's actions, even where an administrative regulation is found, the Ninth Circuit has effectively undermined the basic features of seamen's actions as defined by this Court over the past century. Neither 45 U.S.C. §53 nor sound policy supports the Ninth Circuit's decision. Petitioners Royal King Fisheries, Inc. and Royal Seafoods, Inc. respectfully submit that the intervention of this Court is needed to ensure that comparative negligence, and the important policies embodied

in that doctrine, are preserved. The Writ of Certiorari should be granted.

DATED this 21 day of January, 1997.

LE GROS, BUCHANAN & PAUL

ROBERT M. WINDES
Of Attorneys for Petitioners
Royal King Fisheries, Inc., and
Royal Seafoods, Inc.

APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VILMOS FUSZEK, *Plaintiff-Appellant,* v. ROYAL KING FISHERIES, INC., a Washington corporation; FT ROYAL KING, #592205; and ROYAL SEAFOODS, INC., a Washington corporation, *Defendants-Appellees.*	No. 95-35197 D.C. No. CV-93-01247-WLD OPINION
VILMOS FUSZEK, *Plaintiff-Appellee,* v. ROYAL KING FISHERIES, INC., a Washington corporation; ROYAL SEAFOODS, INC., a Washington corporation, *Defendants-Appellants.* and FT ROYAL KING, #592205 *Defendant.*	No. 95-35840 D.C. No. CV-93-01247-WLD

VILMOS FUSZEK, *Plaintiff-Appellant,* v. ROYAL KING FISHERIES, INC., a Washington corporation; ROYAL SEAFOODS, INC., a Washington corporation, *Defendants-Appellees.* and FT ROYAL KING, #592205 *Defendant.*	No. 95-35874 D.C. No. CV-93-01247-WLD

Appeals from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted
May 9, 1996 – Seattle, Washington

Filed October 23, 1996

Before: Donald P. Lay,* Warren J. Ferguson, and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Admiralty and Marine/Torts

The court of appeals vacated judgment of the district court in part, affirmed in part, and reversed in part. The court held that the Federal Employers Liability Act (FELA) bars reduction of a seaman's damages for a work injury based on comparative fault, when the injury is due to the employer's violation of a Coast Guard safety regulation.

The fish factory trawler *FT Royal King* was operating at sea with a dilapidated filleting machine that had most of its safety features removed. To reduce delay, the ship's management had adopted a policy of clearing the machine's frequent jams without turning it off. This meant that the operator had to reach into the machine while it was running to clear the obstruction by hand. A Coast Guard regulation requires that all exposed machinery aboard a vessel have suitable hand covers.

While serving as a technician for the filleting machine, appellant Vilmos Fuszek attempted to clear a jam and caught his hand in a gear. He suffered substantial injuries.

Fuszek brought an admiralty action against the vessel, its owner, and the operator, seeking relief under general admiralty and maritime law and the Jones Act. Fuszek rejected a defense pretrial settlement under Fed. R. Civ. P. 68 offer of $550,000.

The district court determined that the area of the *Royal King* occupied by the filleting machine had been unseaworthy and awarded Fuszek damages of $559,908 plus interest. Based on a finding that Fuszek had been 25 percent at fault, the court reduced his award to that degree. The court taxed the defendants with most of Fuszek's deposition costs and rejected a request that their costs be borne by him. The court also taxed against Fuszek the defendants' copying costs incurred after the settlement offer. Both sides appealed.

Section 3 of FELA provides that contributory negligence does not apply to an employee whose injury is contributed to by a common carrier's violation of any statute enacted for the safety of employees.

[1] The FELA effectively abrogated the doctrine of contributory negligence in favor of comparative fault for railroad employees. [2] the Jones Act grants to seamen the rights and remedies available to railroad workers under FELA.

[3] An employer's violation of a safety statute designed to protect employees precludes a district court sitting in admiralty from considering the comparative fault of an injured seaman-claimant. A regulatory violation can amount to negligence per se under the Jones Act if five elements are met: (1) a violation of Coast Guard regulations; (2) the plaintiff's membership in the class of intended beneficiaries of the regulation; (3) an injury of a type against which the regulation is designed to protect; (4) the unexcused nature of the regulatory violation; and (5) causation.

[4] The district court erred by reducing Fuszek's damage award for comparative negligence. The ship was in unexcused violation of a Coast Guard safety regulation that was designed not only to protect members of the class to which Fuszek belonged, but also to prevent the type of injury he sustained.

[5] In light of the court's holding, the district court's award to the defendants had to be set aside because Rule 68 was inapposite. The district court's final award totaled $559,908 plus interest *before* it was reduced for comparative negligence.

[6] In light of the fact that Fuszek's counsel failed to itemize his copying expenses, the district court did not abuse its discretion by not awarding Fuszek his pre-offer copying expenses.

COUNSEL

Howard M. Goodfriend, Edwards, Sieh, Hathaway, Smith & Goodfriend, Seattle, Washington; David Merritt Beninger, Luvera, Barnett, Brindley, Beninger & Cunningham, Seattle, Washington, for the plaintiff-appellant-cross-appellee.

Robert N. Windes, LeGros, Buchanan & Paul, Seattle, Washington, for the defendants-appellees-cross-appellants.

OPINION

LEAVY, Circuit Judge:

In these consolidated appeals we are called upon to determine whether section 3 of the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 53, overrides the longstanding maritime doctrine of comparative fault in a situation in which a ship's violation of a safety regulation contributed to a seaman's injuries. Under the facts of this case, we hold that FELA precludes the reduction of damages on the ground of comparative fault.

FACTS AND PRIOR PROCEEDINGS

The FT ROYAL KING is a factory trawler owned by Royal King Fisheries, Inc. and operated by Royal Seafoods, Inc. In February 1993, the ROYAL KING was fishing and processing cod in the Bering Sea off the coast of Alaska. Vilmos Fuszek served aboard the vessel as a fish processing machine technician. Fuszek's duties were to assist in the operation and maintenance of the ROYAL KING's Baader 99 machine, which cuts whole fish into filets and dumps the unusable portions into an offal conveyor.

The ship's captain described the ROYAL KING's Baader 99 as a "piece of junk." Most of its original safety features had been removed; it ran poorly, jammed frequently, and could be kept running only with the constant intervention of both the factory superintendent and

Fuszek. In order to avoid processing delays,[1] the ROYAL KING's factory superintendent adopted the policy of clearing jams without turning the machine off; *i.e.*, the operator had to reach into the machine and clear away any fish debris by hand while the machine was still running.

On February 28, 1993, Fuszek reached into the running machine to clear a jam and the glove on his right hand caught in a moving gear. His hand was severely lacerated and partially crushed. Two years and three surgeries later, Fuszek's injuries still prevented him from returning to work as a Baader 99 technician.

Fuszek timely filed the instant admiralty action in federal district court against the vessel, its owner, and its operator (collectively, "defendants"), seeking relief under general admiralty and maritime law as well as under the Jones Act, 46 U.S.C.App. § 688(a). At the conclusion of the trial, the district court held, *inter alia*, that the portion of the ROYAL KING occupied by the Baader 99 machine was unseaworthy and the vessel's owner and operator were negligent in maintaining the defective machine. The court entered judgment in favor of Fuszek but reduced his damage award by 25%, based on the court's finding that Fuszek's injuries were partially due to his own negligence. Fuszek filed a timely notice of appeal, arguing that section 3 of FELA prohibits a court from reducing a

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[1] The district court found – and the parties do not dispute – that, because the Alaskan cod season is short, and the economics of the industry are risky, great pressure is placed on vessels and their crews to avoid processing delays and thereby keep production levels high.

seaman's damage award for comparative negligence where the injury sustained was due to the employer's violation of a federal safety regulation.

The district court subsequently entered an order taxing the defendants with most of Fuszek's deposition costs while rejecting the defendants' request that their deposition costs be taxed against Fuszek. The defendants timely appealed, arguing that Fuszek's pretrial rejection of their offer of judgment under Fed.R.Civ.P. 68, which was more than the judgment, entitled the defendants to recover their deposition costs from Fuszek and precluded him from recovering his deposition costs from them. Fuszek timely cross-appealed, challenging the district court's taxation against him of the defendants' photocopying costs incurred after the settlement offer, while rejecting Fuszek's photocopying bill.

ANALYSIS

I

Fuszek first contends that the district court erred by reducing his damage award in an amount equal to the degree of his comparative negligence, because federal statutory law effectively overrides the maritime common law doctrine of comparative fault in situations in which seamen are injured by machinery that is not in compliance with federal safety regulations. We review *de novo* the district court's interpretation of federal law. *See Newman v. Chater*, 87 F.3d 358, 361 n.2 (9th Cir. 1996).

[1] One of the three nearly insurmountable barriers long faced by workmen seeking to recover damages for

injuries sustained in the workplace was the common law doctrine of contributory negligence.[2] In 1908, however, Congress passed the first of what came to be known as the Federal Employers' Liability Acts, and thereby effectively abrogated the doctrine of contributory negligence in favor of comparative fault for railroad employees. *See* 45 U.S.C. § 53; W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts,* § 67 at 471 n.21 (5th ed. 1984).

[2] With this as our historical starting point, we begin by noting that the Jones Act expressly grants to seamen the rights and remedies available to railroad workers under FELA. *See* 46 U.S.C.App. § 688(a) ("Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."). *Accord Kernan v. American Dredging Co.,* 355 U.S. 426, 439 (1958).

Section 3 of FELA provides:

> In all actions . . . brought against any . . . common carrier . . . to recover damages for personal injuries to an employee, . . . the fact

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[2] The other two barriers were the assumption of risk doctrine and the so-called fellow servant rule. By way of comparison, injured seamen faced a much lower hurdle, because any negligence on their part served only to reduce the amount of their recovery, not bar it entirely. *See, e.g., Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 431 (1939) ("Under that doctrine [*i.e.,* 'the established admiralty doctrine of comparative negligence,'] contributory negligence, however gross, is not a bar to recovery but only mitigates damages.").

> that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee.

45 U.S.C. § 53 (in relevant part; emphasis in original).

One example of just such a "statute enacted for the safety of employees" (viz., seamen) is 46 U.S.C. § 4502(b)(2)(G). That statute provides, in relevant part, that "the Secretary shall prescribe regulations requiring the installation, maintenance, and use of . . . equipment . . . required to minimize the risk of injury to the crew during vessel operations, if the Secretary determines that a risk of serious injury exists that can be eliminated or mitigated by that equipment."

It is in line with section 4502(b)(2)(G) that the Coast Guard promulgated 46 C.F.R. § 28.215.[3] That regulation – which both sides concede applies here – requires all exposed machinery on board a vessel to have suitable hand covers. As it is undisputed that Fuszek was injured by exposed machinery on board a vessel lacking a suitable hand cover, Fuszek argues that his claim falls within the narrow statutory exception carved out by the Jones

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[3] Paragraph (b) of section 28.215 states, in relevant part, that "[s]uitable hand covers . . . must be installed in way of machinery which can cause injury to personnel[.]"

Act's incorporation of FELA § 3 to the general maritime common law rule of comparative fault, with the result that his damage award should be exempt from any reduction for comparative fault. We agree.

[3] In the case of *Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037 (5th Cir. 1986) (on denial of reh'g), the Fifth Circuit adopted a broad reading of the Jones Act's incorporation of FELA § 3 and held that an employer's violation of a safety statute that was designed to protect its employees precluded the district court, sitting in admiralty, from considering the comparative fault of the injured employee-claimant. *Id.* at 1041, 1043. More to the point, the Fifth Circuit earlier held that a regulatory – not statutory – violation could amount to negligence *per se* under the Jones Act if five elements were met: "(1) a violation of Coast Guard regulations, (2) the plaintiff's membership in the class of intended beneficiaries of the regulations, (3) an injury of a type against which the regulations are designed to protect, (4) the unexcused nature of the regulatory violation, and (5) causation." *Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 160 (5th Cir. 1985). *Accord* 1 T. Schoenbaum, *Admiralty and Maritime Law*, § 6-22 at 322 & nn. 31, 32 (2d ed. 1994).

We find the Fifth Circuit's reasoning in *Roy Crook* and in *Smith* not only to be highly persuasive, but consistent with our decision in *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985). *Kopczynski* involved a seaman who had been injured while working aboard a moored vessel. The injured seaman argued that the Jones Act's incorporation of FELA § 3 precluded the district court from reducing his damage award for comparative negligence, because his injuries

were attributable, at least in part, to the vessel's failure to comply with certain OSHA regulations. 742 F.2d at 557-58.

The district court rejected the seaman's argument, holding that the vessel's negligence was attributable to its violation of an OSHA regulation regarding the use of gangways and ladders, and such regulations were promulgated not for the protection of seamen but for the protection of longshoremen and harborworkers. *Id.* at 558. Although we upheld the district court's ruling, we noted in passing that the seaman could have recovered in full (i.e., without any reduction for comparative fault) if he had been injured while at sea and his injuries had been due to negligence attributable to the violation of a Coast Guard regulation, because "The Coast Guard is the primary federal agency which exercises authority over the working conditions of seamen." *Id.* at 559.

[4] In light of the above, we hold that the district court erred by reducing Fuszek's damage award for comparative negligence. The ship was in unexcused violation of a Coast Guard safety regulation that was designed not only to protect members of the class to which Fuszek belonged, but also to prevent the type of injury he sustained. *See Smith*, 772 F.2d at 160. *See also Brooker v. Cleghorn*, 907 F. Supp. 1406, 1409-11 (D.Haw.1994) (district court struck vessel owner's defense of comparative negligence because seaman's injuries were attributable, at least in part, to vessel's being in violation of Coast Guard safety regulation designed to protect class of individuals to which seaman belonged).

II

[5] Fuszek argues in his cross-appeal from the defendants' Rule 68 challenge that the district court abused its discretion when it denied recovery of his photocopying expenses incurred before the defendants made their Rule 68 settlement offer while granting the defendants' post-settlement offer photocopying costs. In light of our holding above, the district court's award to the defendants must be set aside, as Rule 68 is inapposite.[4]

[6] The only remaining question, then, is whether the district court abused its discretion by not awarding Fuszek his pre-offer photocopying expenses. *See* Fed.R.Civ.P. 54(d)(1). In light of the fact that Fuszek's counsel failed to itemize his copying expenses, we conclude that the district court did not abuse its discretion by ruling as it did.

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[4] The defendants argued on their appeal that, because Fuszek rejected their $550,000 settlement offer and failed to obtain a judgment of more than $550,000, the district court erred by failing to tax against Fuszek the cost of the depositions taken by the defendants and either used at trial or needed for trial preparation, while taxing against the defendants most of the deposition costs incurred by Fuszek.

The district court's final award totalled $559,908 plus interest *before* it was reduced for comparative negligence. In light of our holding that the award should not have been reduced for comparative negligence, this issue is moot.

CONCLUSION

The district court's decision to reduce Fuszek's damage award by 25% for comparative negligence is REVERSED. The district court's award of post-settlement offer photocopying expenses is VACATED. The district court's denial of Fuszek's claimed photocopying costs is AFFIRMED. The district court's remaining rulings on taxation of costs are VACATED AS MOOT. Each side will bear its own costs on appeal.

APPENDIX 2

United States District Court
WESTERN DISTRICT OF WASHINGTON

VILMOS FUSZEK, Plaintiff, V. F/T ROYAL KING, et al., Defendants.	JUDGMENT IN A CIVIL CASE CASE NUMBER: C93-1247WD (Filed Jan. 24, 1995)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff Vilmos Fuszek has judgment against defendants Royal King Fisheries, Inc., Royal Seafoods, Inc., and F/T ROYAL KING, in the amount of $366,750, plus prejudgment interest at six percent per annum from February 28, 1993, to the date this judgment is entered.

January 24, 1995
Date

BRUCE RIFKIN
Clerk

/s/ Eileen Scollard
(By) Deputy Clerk

APPENDIX 3

United States District Court
WESTERN DISTRICT OF WASHINGTON

VILMOS FUSZEK,
Plaintiff,
V.
F/T ROYAL KING, et al,
Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

CASE NUMBER: C93-1247WD

(Filed Mar. 20, 1995)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff Vilmos Fuszek had judgment against defendants Royal King Fisheries, Inc., Royal Seafoods, Inc., and F/T ROYAL KING, in the amount of $419,931, plus prejudgment interest at six percent per annum as follows: On $150,000, from February 28, 1993; on $31,968, from December 31, 1993; and on $57,087, from December 31, 1994.

This amended judgment replaces the judgment entered on January 24, 1995.

March 20, 1995
Date

BRUCE RIFKIN
Clerk

/s/ Eileen Scollard
(By) Deputy Clerk

APPENDIX 4

United States District Court
WESTERN DISTRICT OF WASHINGTON

VILMOS FUSZEK,
Plaintiff,
V.
F/T ROYAL KING, et al.,
Defendants.

SECOND AMENDED **JUDGMENT IN A CIVIL CASE**

CASE NUMBER: C93-1247WD

(Filed Jan. 13, 1997)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

In accordance with the mandate of the Court of Appeals, plaintiff Vilmos Fuszek has judgment against defendants Royal King Fisheries, Inc., Royal Seafoods, Inc., and F/T ROYAL KING in the amount of $559,908, plus prejudgment interest at six percent per annum as follows: On $150,000, from February 28, 1993; on $42,624, from December 31, 1993; and on $57,087, from December 31, 1994. This second amended judgment replaces the amended judgment entered on March 20, 1995.

1-13-97
Date

Bruce Rifkin
Clerk

/s/ Mary Duett
(By) Deputy Clerk

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VILMOS FUSZEK, Plaintiff, v. F/T ROYAL KING, #592205 ROYAL KING FISHERIES, IND., MARINE ASSOCIATES LTD.,	)	No. C93-1247WD Seattle, Washington January 24, 1995 11:00 a.m.

TRANSCRIPT OF COURT'S DECISION
BEFORE THE HONORABLE WILLIAM L. DWYER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Mr. David M. Beninger
Law Offices - Paul N. Luvera
P.O. Box 427
Mount Vernon, Washington 98273

and

Mr. Malcolm S. McLeod
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Seattle, Washington 98104

For the Defendants: Mr. Robert N. Windes
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2500 Columbia – Center
701 Fifth Avenue
Seattle, Washington 98101

Court Reporter: Mr. Stephen W. Broscheid
600 U.S. Courthouse
1010 Fifth Avenue
Seattle, Washington 98104
(206) 553-1899

Proceedings recorded by mechanical stenography transcript produced by computer.

[p. 2] (On January 24, 1995 at 11:00 a.m., with counsel for the parties present, the following proceedings were had:)

THE COURT: Now, I have read and considered all the evidence received and the arguments and briefs of counsel. And I can give you now the decision in this case.

Counsel on both sides have been very thorough. The clients on both sides can be sure that everything that could reasonably have been brought up in their behalf has been.

What I am about to say will constitute the findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure.

First, I find as facts the admitted facts as stated in the pretrial order, and those are incorporated by reference now in this decision.

I find the following facts by a preponderance of the evidence:

The plaintiff Vilmos Fuszek was employed aboard the vessel ROYAL KING as a Baader Technician.

The ship owner was defendant Royal King Fisheries, Inc. The employer was Royal Seafoods, Inc. These two

related corporations, if there is liability in this case, will be liable along with the vessel itself which is named as a defendant.

I find that Mr. Fuszek was injured on February 28, 1993 while the ROYAL KING was at work in the Bering Sea.

The injury happened in this fashion:

[p. 3] There was a Baader 99 machine aboard the vessel which had been placed there temporarily for the cod fishing season. The function of this machine was to fillet cod fish. The machine was functioning poorly. It was jamming frequently. It was a cause of delay and interruptions, as it had been chronically in the past.

A piece of fish debris became lodged in the machine, an event which had been happening repeatedly. Mr. Fuszek reached in to clear the debris, his right hand was caught in the machinery, and his right hand sustained a serious injury.

I find a combination of factors caused this accident. The first was a defective machine. It was old, worn out and the cause of frequent jam-ups. The captain has described it as a piece of junk; others have described it in terms not really any more complimentary. There had been efforts by the captain and others to get it replaced. For whatever reason these efforts had been in vain.

Frequent intervention by crew members was needed to try to keep this machine going. There was aboard the vessel a sense of pressure to keep production going, and that is almost inevitable on these Alaska fishing vessels,

given the short season, the risky economics of the business, the fact that the crews work on shares. There almost always is pressure to keep production going, and aboard this particular factory trawler that pressure was felt by all concerned.

[p. 4] So as a result of this combination of physical events and working atmosphere a practice developed, which included the factory superintendent as well as the Baader technician, Mr. Fuszek – the practice of clearing the machine by hand rather than turning it off and thereby interrupting production.

I find that under the standard test for unseaworthiness this part of the vessel, the part occupied by the Baader 99 machine, was unseaworthy at the time and place of the accident.

I find also that the defendants were negligent in causing and permitting this state of affairs to continue. And by "this state of affairs" I am referring to the combination of the defective machine, the pressure to keep production going, and the practice which had developed involving, as I say, the factory superintendent as well as the Baader technician, of reaching in to clear the machine.

I find, also, that there has been a violation of the Coast Guard regulation at 46 C.F.R. 28.215 which requires that "Suitable hand covers, guards, or railing must be installed in way of machinery which can cause injury to personnel, such as gearing, chain or belt drives, and rotating shafting."

That means, as I understand it from the evidence, guarding to prevent the insertion of a body part. There

were no guards here. I do want to add, though, that this finding as to the violation of the Coast Guard regulation has no net effect on the outcome of this case because I would reach the same findings [p. 5] and conclusions under the standard doctrines of unseaworthiness and negligence, which everyone in this room is well familiar with. I find in that regard that the doctrine of comparative fault or comparative negligence is not displaced when a violation of the Coast Guard regulations is involved.

The OSHA regulations, in my judgment, are not applicable in the legal sense to this situation, but they can be considered as evidence relating to the standard of care. Again, the outcome would be the same if the OSHA regulations had not been offered or referred to in evidence.

One line of defense has been the primary duty rule. I find that Mr. Fuszek's responsibilities were not such as to invoke this rule. He was not in charge or responsible for conditions in the way that the rule requires.

But I do find that there was comparative fault on his part – not in maintaining or repairing the equipment, and not in reaching in at the moment he did, because the evidence shows that reaching in had unfortunately become a frequent and accepted practice, rather, he was contributorily negligent in reaching in in a way that caused his hand to get caught. Experience had shown over and over again that it was possible to reach into this machine to clear something without getting one's hand caught. He had done it many times; so had the factory superintendent.

At the moment of this accident he was inattentive [p. 6] enough to reach in in a way that permitted his hand to get caught in the machinery. In that respect he must be charged with contributory fault which I find was present to the extent of 25 percent. So the fault for this accident will be allocated 75 percent to the defendants and 25 percent to the plaintiff.

That result would be the same with or without reference to Exhibit 82, the pretrial statement by the factory superintendent. In other words, if that had not been received in evidence, the outcome would be the same. And it would also be the same with or without reference to Exhibit 63, an answer to interrogatory which was received over objection.

Now, as to damages. This accident resulted in a serious lacerating and crushing type of injury to the right hand. Some nerves, tendons and muscles were severed. There was surgery at Adak and then there were two more surgeries in Seattle. There has been a partial recovery, but not a 100 percent recovery. And, of course, it follows from these findings that Mr. Fuszek is entitled to compensation.

He has overstated the effects of this accident on several occasions. He has overstated them in dealing with some of the doctors and with a psychologist retained by the defense side. He has overstated them in some respects in his deposition testimony. Nevertheless, there are real after-effects, including a partial loss of sensation, a point of irritation or causalgia, some loss of usability, and scarring.

[p. 7] As to the economic damages, I find that Mr. Fuszek was a good worker, highly regarded by the others in the employ of the defendants, and was a capable Baader technician who would have continued for some time in that job had he been able to.

I find that he probably will not be able to return to work as a Baader technician because of the injuries, but I believe he will find a good job as a mechanic. He is well-trained and highly skilled. As I have said, he is a good worker and I am satisfied that he will be able to return promptly to employment in a way that uses his skills and gains compensation accordingly.

Now, as to quantifying the economic loss. We have questions of what the yearly income should be, what the replacement income should be, what the discount rate should be.

Speaking generally, the fishing industry, as shown by the evidence here, is not the most solid proposition in the world for future employment. I believe that as to the level of income, assuming one were to continue as a Baader tech or in any other position, it is necessary to be modest in the expectations.

Also as to length of service, the evidence shows – and it is an undeniable fact in my judgment – that this is primarily a young man's business, less markedly so in the technical and officer positions, but still, to a great extent, a young person's business. It is not realistic to expect that a [p. 8] saltwater fisherman in the Bering Sea is likely to continue carrying on that work until what would be a normal retirement age for a shoreside person.

I find on the basis of all the evidence that Exhibit A-19, which is Mr. Knowles's summary, approximates the lost income sustained by Mr. Fuszek properly reduced to present value, with certain exceptions. I believe the 1993-94 income has been understated by about $40,000. And that being so, a fair and reasonable approximation of the lost income as a result of this accident comes to $189,000.

I find that it is fair to treat 1995 as an income year because with a more diligent effort Mr. Fuszek could be starting back to work about now.

I find also that he will not need retraining. He may need some further work in English – although I think he is doing very well in that respect – but I do not see any substantial retraining as being necessary.

Now, as to general damages. He is entitled to compensation for pain and suffering, both physical and mental. The mental suffering, however, cannot include any mental suffering over the legal process. That was mentioned during the proof as something that Mr. Fuszek has experienced, but it is not compensable.

Pain and suffering resulting from the accident and the injuries, rather than from the legal process, is compensable. [p. 9] He is also entitled to compensation for partial disability and loss of enjoyment of life to the extent those have been proximately caused by his injuries.

I find that a reasonable figure for general damages for all of those items is $300,000. The total damages are thus $489,000, reduced by 25 percent for contributory

fault, comes to $366,750. That should be accompanied by prejudgment interest under the rules applicable to seamen's injury cases. I find six percent per annum for prejudgment interest from and after February 28, 1993, would be reasonable.

Mr. Fuszek did reach maximum cure at about the time stated by Dr. Sack, and no additional maintenance and cure entitlement has been shown.

Now, the conclusions of law following from these findings of fact:

The court has jurisdiction under 46 U.S. Code Section 688 and under the general admiralty and maritime law.

Plaintiff, Vilmos Fuszek, is entitled to judgment against the defendants Royal King Fisheries, Inc., Royal Seafoods, Inc. and the vessel F/T ROYAL KING in the amount of $366,750 with prejudgment interest at six percent per annum from February 28, 1993, until the date judgment is entered.

So judgment will be entered accordingly. Do counsel have anything else to take up?

MR. WINDES: Your Honor, my understanding is that the prejudgment interest should apply to the past wages and not to the wages from this day on. I would request a clarification as to which wages are past, which are future, I guess for purposes of defining an interest rate, unless I am totally incorrect in what I just said.

THE COURT: Mr. Beninger.

MR. BENINGER: I understood it to apply to past as well, Your Honor.

THE COURT: I believe it is ordinarily applied to the whole award and that was my intent.

THE COURT: Anything else to take up at this point?

MR. BENINGER: No, Your Honor.

THE COURT: My thanks then to both sides and we will be in recess.

(11:26 a.m., end of proceedings)

CERTIFICATION

I, Stephen W. Broscheid, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Stephen W. Broscheid Date

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VILMOS FUSZEK, Plaintiff, v. F/T ROYAL KING, #592205 ROYAL KING FISHERIES, INC., ROYAL SEAFOODS, INC., Defendants.	)	No. C93-1247WD Seattle, Washington March 16, 1995 2:15 p.m.

SUPPLEMENTAL DECISION
BEFORE THE HONORABLE WILLIAM L. DWYER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Mr. David M. Beninger Law Offices – Paul N. Luvera P.O. Box 427 Mount Vernon, Washington 98273
For the Defendants:	Mr. Robert N. Windes LeGros, Buchanan & Paul 2500 Columbia Center 701 Fifth Avenue Seattle, Washington 98101
Court Reporter:	Mr. Stephen W. Broscheid 600 U.S. Courthouse 1010 Fifth Avenue Seattle, Washington 98104 (206) 553-1899

Proceedings recorded by mechanical stenography, transcript produced by computer.

[p. 2] (On March 16, 1994 at 2:15 p.m., with counsel for the parties present, the following proceedings were had:)

THE COURT: Be seated, please. This case has been reopened under Rule 59(a) for the reception of additional evidence relating to post-judgment motions that were timely filed. I have considered all the evidence presented and the arguments of counsel.

First, in regard to objections made to evidence offered by one side or the other on the ground that it was not timely disclosed in advance of today's hearing, insofar as those objections have not already been overruled, they are overruled now. Both sides were well able to respond to what was presented and both confirmed before we got to argument that they needed no further opportunity to present evidence.

In the initial findings of fact and conclusions of law and judgment in this case, the court found damages of $489,000. That figure was reduced by 25 percent for contributory fault to $366,750. Of that $489,000, $189,000 was for lost income. In arriving at the lost income figure the court adopted largely the calculations of Dr. Knowles, and then made a $40,000 adjustment to those computations.

A word should be said about the methodology used to arrive at present value of future lost earnings. I have not thought it necessary to spell out in the findings the details of the methodology, since they were explained in the testimony of [p. 3] the witness whose method I adopted by reference in that respect, namely Dr. Knowles.

I have used the 1.75 percent discount rate substantially for the reasons given by that witness.

Now, turning to the specific motions that are before us. The first is plaintiff's Rule 59 motion to amend the judgment or for a new trial regarding the amount of lost earnings recoverable.

The plaintiff contends that the court should remove the deduction of employment-related expenses because, in fact, those items were provided by the employer. Plaintiff contends secondly that fringe benefits should be added to the award.

I find by a preponderance of the evidence that the deduction for expenses should not have been made. The expenses in question were paid by the employer. I find that in all likelihood they would have continued to be paid on the same basis.

I find also that the proposed adjustment to add fringe benefits has not been established by the evidence. And I find that the amount of FICA payments by the employer has not been established as an item of compensable damage.

Now, to summarize and illustrate what I have just said, the easiest approach is to work with Exhibit 8 presented at today's hearing, that is Dr. Bassett's revised chart using Dr. Knowles' assumptions.

Referring to today's Exhibit 8, the pre-injury earnings [p. 4] come to $524,053. Reduced for taxes at 15 percent, the figure becomes $445,445. The fringe benefit column in that exhibit is stricken. The post-injury earnings,

$261,386. Net of tax, $232,633. The FICA column is stricken.

As to the summary: Pre-injury after tax, $445,445. Post-injury after tax, $232,633. The fringe benefit item being deleted. The FICA differential item is also deleted. Tax on interest, $7,096. Adding also the $40,000 adjustment that I made and I will get back to in a moment, the total lost income is $259,908.

Turning now to the defendants' motion, which is denominated a motion under Rule 60(b), seeking to subtract that $40,000 adjustment made in the initial findings of judgment.

Each side in this case filed a timely Rule 59 motion – that is, within a prescribed number of days following the entry of judgment. The defendants filed after that time a motion denominated a Rule 60(b) motion for additional relief regarding the amount of damages. Under Rule 59(a), motion for new trial, and Rule 59(e), motion to amend judgment, each of those must be served not later than ten days after the entry of judgment. The time cannot be expanded by the court.

The defendants' motion as to the $40,000 goes to the substance of the findings of fact and judgment and is based on additional testimony the defendants wanted to present. They were allowed to present that testimony today. But in reality [p. 5] this is a Rule 59(e) motion. It does not qualify as a Rule 60(b) motion. It does not qualify under the newly-discovered evidence provision, nor under the mistake or excusable neglect provision, and it therefore must be denied on that ground as untimely.

I am going to make a further finding, though, in regard to that motion, which is that if the merits were reached the motion would be denied, because although the evidence is subject to differing interpretations, the $40,000 adjustment that I made I am satisfied is adequately supported by the evidence.

In arriving at lost earnings, we must deal in approximations; precision is impossible. The findings made, I believe, as closely as possible reflect what plaintiff would have earned as an able-bodied, trained technician in his field.

Thus the damages are now found to be as follows:

Lost earnings, $259,908. Pain, suffering and other general damages, $300,000. Total, $559,908. All of that is subject to a reduction of 25 percent for contributory fault, leaving a net recovery of $419,931.

In regard to comparative fault, I want to elaborate on a ruling made in the original oral decision. The question is whether comparative fault applies where a Coast Guard regulation has been violated. Obviously it does apply where liability is based on negligence or unseaworthiness.

The Kernan case in the Supreme Court has been cited, [p. 6] but does not cover this exact point. There are district court cases in the Ninth Circuit which have held that comparative fault still is available where a regulation has been violated. The Fifth Circuit has said otherwise, but appears to have contradicted itself on the subject. The Ninth Circuit, as a court of appeals, has not spoken directly to the subject.

In my judgment it comes to this:

In admiralty and maritime law comparative fault is a long-standing doctrine, and this body of law is ancient as our legal traditions go. Comparative fault, we know, applies not just in negligence cases, but also where unseaworthiness is the basis of the ship owner's liability. Unseaworthiness is a form of strict liability; nevertheless we have comparative fault. I do not believe Congress intended to make a different rule where a regulation such as a Coast Guard regulation was violated. For these reasons, comparative fault still applies.

A further motion to be decided today is the defendants' motion regarding prejudgment interest. Prejudgment interest should be awarded only as to past lost earnings and past general damages. Therefore, part of the ruling awarding prejudgment interest in the initial findings, conclusions and judgment was in error.

It is necessary to segregate both the economic damages and the general damages for this purpose. After the 25 percent reduction for contributions, fault and dividing the $40,000.00 [p. 7] adjustment in half of 1993 and 1994, the recoverable lost earnings items for those two years are as follows:

1993, reduced by 25 percent, $31,968. 1994, reduced by 25 percent, $57,087. As to the first figure mentioned, prejudgment interest at six percent will be recovered from the end of 1993. As to the second figure mentioned, $57,087, prejudgment interest at six percent will be recovered from the end of 1994.

As to the general damages, I believe they should be fairly and reasonably allocated half and half to the pre-trial and post-trial periods. Prejudgment interest therefore on $150,000 from the date of the accident, February 28, 1993, to the date judgment is entered.

The conclusion of law that follow from these additional findings and corrected findings is that the court has jurisdiction for the reasons stated earlier and plaintiff will be entitled to an amended judgment against defendants in the amount of $419,931. Prejudgment interest under the three items mentioned will be ordered as stated, and judgment will be entered accordingly.

Do counsel have any question or anything else to take up?

MR. BENINGER: No, Your Honor.

THE COURT: All right. My thanks again to both sides. We will be in recess.

[p. 8] (2:33 p.m., end of proceedings)

CERTIFICATION

I, Stephen W. Broscheid, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Stephen W. Broscheid _____ Date _____

APPENDIX 7

STATUTE

45 U.S.C. §53 Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908 c. 1949, §3, 35 Stat. 66.) (App.G)